No. 11,306

IN THE

United States
Circuit Court of Appeals
For the Ninth Circuit

TAKEO TADANO,
Appellant,
vs.
O. W. MANNEY, Officer in Charge, United States Immigration and Naturalization Service at Phoenix, Arizona,
Appellee.

BRIEF FOR APPELLEE

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STATEMENT OF CASE

This is an appeal from the judgment (T.R. 87, 88) of the District Court for the District of Arizona, quashing a writ of habeas corpus and dismissing the petition therefor by which petitioner-appellant sought to be released from the custody of appellee on the ground that he was lawfully within the United States as a treaty trader in accordance with the provisions of the Immigration Act of 1924 and the United States-Japanese Treaty of Commerce and Navigation, and not subject to deportation.

JURISDICTION

The judgment and order of the District Court dismissing the petition for writ of habeas corpus was filed on March 8, 1946 and the notice of appeal was filed on that same date. The jurisdiction of this Court is conferred by Section 463, Title 28, U. S. C.

STATUTES AND REGULATIONS INVOLVED

The statutes, treaties and regulations of the Immigration Service involved will be found in the Appendix Pages 19 to 30.

QUESTIONS PRESENTED

1. The evidence presented to the officials of the Immigration and Naturalization Service was sufficient to establish petitioner's loss of his exempt status as a treaty trader or nonimmigrant alien under the Immigration Act of 1924.

2. The petitioner was given a fair and complete hearing in accordance with the law and the regulations of the Immigration and Naturalization Service.

3. A Japanese national admitted to the United States as a trader under Clause 6, Sec. 3 of the Immigration Act of 1924, and the Treaty of Trade and Commerce entered into in 1911 between the United States and Japan is subject to deportation when he remains in the United States after the abrogation of the treaty.

STATEMENT OF FACTS

Petitioner, Takeo Tadano, then 19 years of age, was admitted to the United States at San Francisco, California, on January 5, 1929 as a trader under Clause 6, Par. 3 of the Immigration Act of 1924. He came into this country to work for the Toyo Sauce Manufactur-

ing Company of Los Angeles, California. He continued to work for this company until some time in 1932, at which time the company failed and petitioner moved to the home of his brother, Tadashi Tadano, who lived on a farm near Glendale, Arizona. He continued to live with his brother, a citizen of the United States, from that time until he was married in 1938. From then on he lived on another farm (T. R. 57).

After coming to Arizona in 1932, petitioner attended Glendale High School for some three or three and one-half years (T. R. 57, 66). Upon finishing high school he either worked as a farm laborer for his brother or operated a wholesale produce stand in the Phoenix Terminal Market, depending on which of his statements is accepted as true.

On December 23, 1940, petitioner was examined under oath in the office of the Immigration and Naturalization Service, Phoenix, Arizona, by Philip C. Berner, one of the Immigration Inspectors attached to the Phoenix office. At that time petitioner stated that he went to work for his brother, Tadashi Tadano, on his farm near Glendale, Arizona in 1934 after finishing high school, that he did any and all types of farm work necessary about the place, that he was paid an average of $75.00 a month by his brother, that he had not been connected with any importing or exporting business since the Toyo Sauce Manufacturing Company failed. This sworn statement was reduced to writing by Inspector Berner and certified to by him as being correct (T.R. 63-69).

On the 26th of December, 1940, a warrant for arrest of alien was issued by W. W. Brown, Chief of the Warrant Branch of the Immigration and Naturalization Service, in which warrant it was charged that petitioner was remaining in the United States unlawfully for the

reason that he had failed to maintain the exempt status of an alien entitled to carry on trade under the provisions of an existing Treaty of Commerce and Navigation (T.R. 62).

On January 24, 1941, a formal hearing was held in Phoenix, Arizona before L. M. Brody as presiding inspector. Petitioner was present and represented by counsel, Theodore E. Bowen of Los Angeles. At this hearing all the statements made by petitioner on December 23, 1940 were confirmed with the exception of those in which he admitted being a farm laborer working for his brother. He denied having made such statements, asserting that he had stated he only sold the produce, and went on to say that he had operated a wholesale produce business in the Phoenix Terminal Market for a period of some seven or eight years; that he was the owner and operator of the business; that generally he sold vegetables from his brother's farm on a commission basis, but that he bought from other farmers in some cases; he flatly denied ever doing any farm labor of any kind (T.R. 49,50). It does not appear that examining inspector Berner was present at the hearing, or that petitioner or his counsel asked that he be called for cross-examination.

Subsequent to the hearing, the presiding inspector submitted proposed findings, conclusions and order to counsel for the petitioner (T.R. 39-42). The presiding inspector found that petitioner was engaged in a purely domestic business rather than in foreign trade with his native country and was therefore remaining in this country unlawfully. He recommended that the petitioner be given a chance to voluntarily depart from this country at his own expense within sixty days rather than that he be deported upon warrant.

Exceptions and a brief on behalf of petitioner were filed by his then counsel and the matter was referred to the Board of Immigration Appeals.

In the fall of 1942 the Board of Immigration Appeals, having fully considered the matter, submitted its proposed findings of fact and conclusions of law (T.R. 31-35), which differed somewhat from those of the presiding inspector, to counsel for petitioner, who in a letter dated October 29, 1942, stated that he desired to interpose no further exceptions or objections to the finding of the board but wished those previously made to the findings of the presiding inspector be considered as going to the new findings (T.R. 29-30). Thereafter, there being no further objections on the part of petitioner, a warrant for his deportation was issued (T.R. 26, 27). War having in the meantime broken out between the United States and Japan, it was, of course, impossible for petitioner to be deported; but after hostilities had ended last fall and transportation was available, appellee was ordered to execute the warrant of deportation (T.R. 25). The petitioner, who had been interned as a dangerous enemy alien in the month of February, 1942, was arrested on this warrant on or about December 1, 1945, and immediately instituted the habeas corpus proceedings which have resulted in this appeal.

ARGUMENT

Appellee will concede that petitioner's exempt status as a nonimmigrant trader is determined by the provisions of the Act of 1924 as they existed at the time of his entrance, rather than by later amendments which may have imposed additional conditions on petitioner. Appellee will also concede that under Clause 6, Section 3 of the Act of 1924, a Japanese trader is not limited to commerce between the United States and Japan,

but may engage in purely domestic mercantile activities. See *Shizuko Kumanomido* vs. *Nagle,* (C. C. A. 9) 40 Fed. (2d) 42.

Petitioner's remaining propositions of law will be answered by appellee in his discussion of the questions hereinabove set forth.

1. THE EVIDENCE PRESENTED TO THE OFFICIALS OF THE IMMIGRATION AND NATURALIZATION SERVICE WAS SUFFICIENT TO ESTABLISH PETITIONER'S LOSS OF HIS EXEMPT STATUS AS A TREATY TRADER OR NON-IMMIGRANT ALIEN UNDER THE IMMIGRATION ACT OF 1924.

Petitioner contends that under no circumstances does the record presented to the presiding inspector, L. M. Brody, and the Board of Immigration Appeals, justify the order of deportation and the warrant issued thereon. He asserts that the only thing shown is a temporary departure by the petitioner from his status as a trader when he attended high school, and contends that a temporary departure of an alien from the status under which he was admitted will not subject him to deportation and in support cites the case of *Naoe Minaniji* v. *Carr,* 46 F. (2d) 627, (C.C.A. 9); however, that case does not appear to be in point since the petitioner therein entered the United States as a boy of 15 in 1915, a long time prior to the enactment of the Immigration Act of 1924. As far as it appears from the record of the case, Minaniji was legally admitted and was not in the same category as an alien who came in as a non-immigrant under Section 3 of the Immigration Act of 1924 with a restricted status. Cases decided under prior laws have no particular bearing on the Immigration Act of 1924 and its amendments. (See *Sugaya* v. *Haff,* 78 F. (2d) 989, C.C.A. 9).

Furthermore, it seems absurd for a man of 23 to claim that a three to four year departure from his regular occupation in order to study is temporary; particularly in view of the fact that the immigration laws make a special provision for students (Sec. 4 (e) Immigration Act of 1924, Page 19, Appendix), and the regulations provide that nonimmigrants may apply for and be given a change of status within the discretion of the commissioner (Title 8, Code of Fed. Reg. Rule 3.31, page 23, Appendix).

Leaving out for the moment the fact that the Board of Immigration Appeals based its order on the cancellation of the Japanese treaty, appellee believes there was sufficient evidence before the Board to justify the issuance of the Warrant of Deportation on the grounds stated in the warrant.

At least twice before the formal hearing petitioner had stated that he was a farm laborer; first in August of 1940 in filling in his alien registration form (T.R. 75, 76) and again in the sworn statement which he gave to Inspector Berner on December 23, 1940. At his formal hearing he changed his testimony, denying that he had ever worked as a laborer, but the Immigration Service would have been justified in accepting the earlier version, as was done in the case of *Kumaki Koga* v *Berkshire,* 75 F. (2d) 821, (C.C.A. 9).

That the reason neither the presiding inspector nor the Board of Appeals did so is seen from the fact that both based their conclusions on legal grounds which made such a finding unnecessary. The presiding inspector was proceeding under the erroneous theory that the 1932 amendment (page 19, Appendix) applied and felt he had only to find the petitioner was not engaged in foreign trade with Japan (which petitioner admitted); and the Board undoubtedly felt it useless to

go into the question since the abrogation of the Japanese treaty (See page 27, Appendix) provided ample grounds.

We have, however, only to accept petitioner's own version of the evidence and add to it the additional fact of the expiration of the Japanese treaty in January of 1940, to find sufficient justification for the order of deportation; and the expiration of the treaty was an existing fact which the Board of Immigration Appeals had to take into consideration in determining petitioner's legal status.

2. THE PETITIONER WAS GIVEN A FAIR AND COMPLETE HEARING IN ACCORDANCE WITH THE LAW AND THE REGULATIONS OF THE IMMIGRATION AND NATURALIZATION SERVICE.

Petitioner contends that the hearing afforded him was unfair, first, because the statement of an examining immigrant inspector was improperly admitted in evidence at the hearing; and second, that he was ordered deported on grounds other than those set forth in the warrant of arrest.

As the decision of the Board of Appeals was based on evidence other than that contained in the much maligned statement, appellee sees little purpose in discussing its admissibility. However, he would call this Court's attention to the facts surrounding the taking and introduction of the statement, as well as certain portions of the Immigration Service regulations covering deportations; both those rules which were in effect at the time the statement was taken (Appendix, page 23), and those which went into effect January 20, 1941, just four days before the hearing (Appendix, page 25).

From the face of the statement (T.R. 63-69) it appears that petitioner was not under arrest, that he was duly warned of the consequences, that he was asked if he wished friends or relatives present and that his statement was freely given under oath. The questions were asked and answered in English and immediately reduced to writing on a typewriter by the examining inspector, who certified that the transcript was true and correct. The statement was placed in evidence at the hearing without objection on the part of petitioner or his counsel (T.R. 48). At the hearing petitioner denied having made the statement that he was working on his brother's farm or that he had ever done any farm labor of any kind. The balance of his testimony, and that of his supporting witnesses, confirmed everything else petitioner had originally said. No request was made by petitioner to have the examining inspector subpoenaed for cross-examination, nor did counsel take any exception to the introduction of the statement in the Exceptions and Brief which he filed following the presiding inspector's proposed decision.

Petitioner also offers the objection that the statement was taken in English with no interpreter present. This objection is patently absurd coming from a man who had been in the United States eleven years, attended an American high school for more than three years, and who admitted at the formal hearing that he understood English.

Section 150.6(i) Title 8, Code Fed. Reg. (Appendix, page 25) covers the use of such statements in formal hearings. It specifically provides that "a recorded statement made by the alien . . . during an investigation may be received in evidence . . . if the maker . . . gives testimony contradicting the statements made during the investigation." The only possible error which the presiding inspector committed was in placing the

statement in evidence before the petitioner had denied part of its contents. Since the new regulations had been in effect but a few days this oversight is understandable; in any event under the circumstances it was a harmless error at the most.

Petitioner has cited several excellent cases, including *Bridges* v. *Wixon,* 326 U. S. 135, in support of his contention that the use of such statements is erroneous and grossly unfair to an alien. However, none of the cases seem to be particularly in point, since they concern *unsworn* third party statements, or circumstances where the alien spoke little or no English, or was suffering from some physical or mental handicap.

There is no claim by petitioner that he gave the statement under duress, unwillingly or that he didn't understand the questions; what probably happened is that petitioner, after learning that some of his original statements might be prejudicial to his interests, decided to modify them, as did the petitioner in the case of *Kimaki Koga* v. *Berkshire* (supra).

Petitioner's contention that the hearing was not fair because he was ordered deported for reasons other than those stated in his warrant of arrest is not substantiated by the record. An examination of the two warrants (T.R. 22 and 62) will show the same reasons given in each, in almost identical language:

> Whereas . . . the alien Takeo Tadano, alias George Tadano, who entered the United States at San Francisco, California, S/S "Siberia Maru" on the 5th day of January, 1929, is subject to deportation under the following provisions of the laws of the United States, to-wit: the Immigration Act of 1924, in that he has remained in the United States after failing to maintain the exempt status, under which he was admitted of an alien entitled

to enter the United States solely to carry on trade under the provisions of Section 3(6) of the said Act. (T.R. 22)

Petitioner's real objection is not that the grounds differ, because they don't, but to the difference in the findings of fact made by the presiding inspector and the Board of Appeals on identical evidence. Both came to the same conclusion, to wit: that petitioner had failed to maintain his exempt status as a trader and was subject to deportation. The Board of Appeals merely took into consideration a fact that existed at the time of the hearing, and with the knowledge of which the petitioner as well as everyone else was chargeable. Knowledge of the existence or non-existence of a public law is imputed to every resident of the United States, *Spitzer* v. *Regina Public School Dist.*, 267 Fed. 121; *Evans* v. *Hughes County,* 52 NW 1062. As will be pointed out later, treaties and laws of the United States are in the same category and on an equal footing.

Although petitioner asserts that he was first confronted with the findings made by the Board of Appeals at his habeas corpus hearing, the record is to the contrary. Petitioner's then counsel was served with copies of the proposed findings early in October, 1942 (T.R. 29), but no further exceptions were filed, nor was a rehearing requested, nor did the petitioner make any attempt to apply for a change of status as he might have done under the Immigration and Naturalization Service Circular Letter No. 403, (Appendix, page 29). That he might have applied is immaterial.

Counsel undoubtedly realized that a rehearing would be futile if granted, since no new evidence could be presented by petitioner. The facts would have been the same with the matter resolving itself into a question of

law, that is, the effect of the abrogation of the Japanese treaty on Section 3(6) traders.

In *Ex Parte Turner et al,* 10 F.(2d) 816, cited by petitioner, the Court stated, "The rule is that if, under any view of the evidence it may be said that some proof was made which will support the finding of the immigration officers, the order of deportation will not be interfered with. It is only where the order of deportation is arbitrarily made, and that means, in a case like this, where it is made without the support of any evidence whatsoever on the issue of fact determined in the order, that the Courts will stay its execution." The court sustained the order of deportation. To the same effect see *Wong Nung* v. *Carr,* 30 F.(2d) 766 (CCA 9); *Chin Share Nging* v. *Nagle,* 27 F. (2d) 848; *Kumaki Koga* v. *Berkshire* (supra).

There is no such variance between the warrant of arrest and the Warrant of Deportation as is claimed by the petitioner. The situation is no different from that of an appellate court affirming the action of a lower court on grounds other than those given by the lower court.

3. A JAPANESE NATIONAL ADMITTED TO THE UNITED STATES AS A TRADER UNDER CLAUSE 6, SEC. 3 OF THE IMMIGRATION ACT OF 1924, AND THE TREATY OF TRADE AND COMMERCE ENTERED INTO IN 1911 BETWEEN THE UNITED STATES AND JAPAN IS SUBJECT TO DEPORTATION WHEN HE REMAINS IN THE UNITED STATES AFTER THE ABROGATION OF THE TREATY.

It is now well settled that an alien admitted lawfully as a nonimmigrant under one of the six sub-sections of Section 3 of the Immigration Act of 1924, remains

unlawfully and illegally once he has lost the status under which he was admitted.

Ng Fung Ho vs. *White,* 259 U. S. 276, 66 L. Ed. 938.

Masahiko Inouye vs. *Carr* (CCA 9), 89 Fed. (2d) 447.

Sugaya vs. *Haff* (CCA 9) 78 Fed. (2d) 989.

Chung Yim vs. *United States* (CCA 8), 78 Fed. (2d) 43.

Tatsuma Masuda vs. *Nagle,* (CCA 9), 55 Fed. (2d) 623.

Kumaki Koga vs. *Berkshire* (CAA 9), 75 Fed. (2d) 821.

Ex Parte Tatsumi, 49 Fed. (2d) 935, S. D. California.

To Ming vs. *Commissioner,* 52 Fed. (2d) 791, S. D. New York.

In *Ng Fung Ho* vs. *White* (supra) the Supreme Court stated at page 281, "Unlawful remaining of an alien in the United States is an offense distinct in its nature from unlawful entry into the United States. One who has entered lawfully may remain unlawfully."

Kumaki Koga vs. *Berkshire* (supra) is typical of those cases wherein an alien has entered the United States as a nonimmigrant under one of the subsections of Section 3. Koga came in as a newspaper correspondent, which gave him the legal status of a trader. Although there was some conflict in the evidence, there was sufficient to support the finding that he devoted most of his time working for a brother-in-law in a nursery. This Court decided that in so doing Koga had abandoned his lawful status and was remaining unlawfully as a laborer, stating at page 822, "Of course, one admitted as a 'treaty trader' would have to maintain

such status. Should he fail to do so, he would be subject to deportation, as where one admitted as a merchant becomes a laborer."

Thus it must be conceded by petitioner that if he has lost his status as a trader, he is subject to deportation.

Clause 6 of Section 3 of the Immigration Act of 1924 reads as follows:

> An alien entitled to enter the United States solely to carry on trade under and in pursuance of the provisions of a *present existing treaty of commerce and navigation.* (Italics ours).

The only existing treaty of commerce and navigation which the United States had with Japan in 1924, or later, is the treaty of 1911, the pertinent portions of which are set out in the Appendix, page 26. Article XVII of the treaty in effect provides that it may be terminated by either country upon the giving of six months' notice to the other. Such notice was given Japan by the United States on July 25, 1939, and the treaty expired on the 26th day of January, 1940, six months later (see page 27, Appendix).

Since Clause 6 (supra) imposes on an alien as a condition of his admission as a "treaty trader" the requirement that there be an existing treaty between the United States and the alien's country, once such treaty has expired the alien can no longer comply with the requirements of the law, his exempt status is nullified and he is subject to deportation under Sec. 14 and 15 of the Immigration Act of 1924 and the regulations issued thereunder. (See Page 20, Appendix.)

In the United States, treaties are considered as part of the supreme law of the land in the same category and on the same footing at acts of Congress. (63 C. J. 827,

842, 843; 52 Am. Jur. 815, 817; *Askura* vs. *Seattle,* 265 U. S. 332). The abrogation or expiration of a treaty, like the repeal or expiration of a statute, does not affect anything of *permanent* character which has been acquired or become vested under it, but on the other hand, contingencies or rights which have not accrued must fall with the treaty. (63 C. J. 835; 59 C. J. 1188; 52 Am. Jur. 813).

Even a cursory examination of the treaty provisions and Clause 6 (supra), which must be construed together, reveals that nothing of a permanent character can be acquired by an alien permitted to enter the United States thereunder. At the most the alien has a mere revocable license to remain. And that such a license can be revoked has been held by the Supreme Court in *Ng Fung Ho* vs. *White* (supra), where the Court stated at page 280, "The mere fact that at the time petitioners last entered the United States they could not have been deported except by judicial proceedings presents no constitutional obstacle to their expulsion by executive order now. Neither Ng Fung Ho nor Ng Yuen Shew claims to be a citizen of the United States. Congress has power to order any time the deportation of aliens whose presence in the country it deems hurtful; and may do so by appropriate executive proceedings."

In *Chung Yim* vs. *United States* (supra), the petitioner, admitted as a trader, claimed among other things that his admission was a permanent one under the Chinese treaty and that he could change his occupation with impunity. In answering that contention the Court stated:

> "In the absence of an Act of Congress so authorizing, a Chinese person admitted to this country as a merchant could not upon subsequent change of his status to that of a laborer be deported unless

his original entry were fraudulent. Wong Sun Fay v. United States (C.C.A. 9) 13 F. (2d) 67; Dang Foo v. Day (C.C.A. 2) 50 F. (2d) 116; Lo Hop v. United States (C.C.A. 6) 257 F. 489; Haff v. Yung Poy (C.C.A. 9) 68 F. (2d) 203. But if the Act of Congress contained provision that some subsequent act or omission by the alien would change his lawful entry into the country into an unlawful remaining in the country, then he is subject to deportation, and this is true even though the alien at the time he entered the United States could not have been deported. Congress has power at any time to order the deportation of aliens whose presence in the country it deems harmful. Ng Fung Ho v. White, 259 U. S. 276, 42 S. Ct. 492, 494, 66 L. Ed. 938; Kumaki Koga v. Berkshire (C.C.A. 9) 75 F.(2d) 820.... While section 14(*) alone would not have the effect of changing the prior law, that a change of status after admission would not subject the alien to deportation (there being no Act of Congress so providing), yet Congress has definitely declared in section 15 (*) that the alien admitted as a trader under clause (6) of section 3 (8 USCA Par. 203 (6)) may not remain in this country if he changes his vocation after entry. Appellant was admitted under clause (6) of section 3, which exempted from the term immigrant 'an alien entitled to enter the United States solely to carry on trade under and in pursuance of the provision of a present existing treaty of commerce and navigation.' Act May 26, 1924, c. 190 Par. 3 (6), 43 Stat. 154, 8 USCA Par. 203 (6).

Section 15 is not inconsistent with the treaty provisions, because the treaty relates to the admission of traders, and not to their remaining in this country, nor to a change of status; and, as we have already observed, one who enters lawfully may remain unlawfully. It is, however, not material whether this section is inconsistent with the

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(*) See page 20, Appendix.

provisions of the treaty or not, because Congress has the power to abrogate a treaty. Boudinot vs. United States, 11 Wall. 616, 20 L. Ed. 227; Cheung Sum Shee vs. Nagle, 268 U. S. 336, 45 S. Ct. 539, 69 L. Ed. 985; Head Money Cases, 112 U. S. 580, 5 S. Ct. 247, 28 L. Ed. 798."

In *Metaxis v. Weedin,* 44 F. (2d) 539 (C.C.A. 9), the petitioner, a Greek national, had entered the United States on a temporary visitor's permit in February, 1924. He immediately went into the grocery business with his brother and later purchased a market of his own. He claimed he was entitled to remain as a trader under the Greek treaty of Commerce and Navigation with the United States, but the treaty having been abrogated in 1921 the Court stated:

" . . . our original decision herein was based upon the rights of a citizen of Greece under that treaty and the laws enacted in pursuance thereof, but upon petition for rehearing it was disclosed that this treaty was abrogated January 26, 1921, pursuant to Article 17 thereof (8 Stat. 506), through the exchange of notes between the two governments, and that no proclamation or other notice of such abrogation is recorded in the books. It appears that the treaty foundation for appellant's alleged rights do not exist, and no other basis for his right to remain is advanced."

That the Department of State and the Immigration Service considered that Japanese traders had lost their exempt status is evidenced by the circular letter, Appendix page 29, which was sent to all immigration offices early in 1940, wherein it was suggested that such traders might, in proper cases, be allowed to enter or remain in the United States as *temporary* visitors. The construction of a law by an administrative or executive department, while not binding on the Courts, is nevertheless entitled to considerable weight. *United States*

v. *Jackson,* 280 U. S. 183; *Petition of Zogbaum,* 32 F. (2d) 911.

CONCLUSION

It therefore appears, that whether he be a farm laborer, a domestic trader, or even a foreign trader, petitioner no longer has an exempt status, but is remaining in the United States unlawfully; and we respectfully submit that the judgment and order of the District Court should be affirmed.

Respectfully submitted,

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APPENDIX

Immigration Act of 1924

Definition of "Immigrant"

Sec. 3. When used in this Act the term "immigrant" means any alien departing from any place outside the United States destined for the United States, except (1) a government official, his family, attendants, servants, and employees, (2) an alien visiting the United States temporarily as a tourist or temporarily for business or pleasure, (3) an alien in continuous transit through the United States, (4) an alien lawfully admitted to the United States who later goes in transit from one part of the United States to another through foreign contiguous territory, (5) a bona fide alien seaman serving as such on a vessel arriving at a port of the United States and seeking to enter temporarily the United States solely in the pursuit of his calling as a seaman, and (6) an alien entitled to enter the United States solely to carry on trade under and in pursuance of the provisions of a present existing treaty of commerce and navigation. 43 Stat. 154.

Clause (6) was amended to read as follows by the Act of July 6, 1932:

(6) An alien entitled to enter the United States solely to carry on trade between the United States and the foreign state of which he is a national under and in pursuance of the provisions of a treaty of commerce and navigation, and his wife, and his unmarried children under twenty-one years of age, if accompanying or following to join him. July 6, 1932, Chap. 434, 47 Stat. 607; Par. 203, Title 8, U. S. C.

* * *

Student Status

(e) An immigrant who is a bona fide student at least fifteen years of age and who seeks to enter the United States solely for the purpose of study at an accredited school, college, academy, seminary, or university, particularly designated by him and approved by the At-

torney General, which shall have agreed to report to the Attorney General the termination of attendance of each immigrant student, and if any such institution of learning fails to make such reports promptly the approval shall be withdrawn; Par 4 of 43 Stat. 155; Par. 204, Title 8, U.S.C.A.

Deportation

Sec. 14. Any alien who at any time after entering the United States is found to have been at the time of entry not entitled under this Act to enter the United States, or to have remained therein for a longer time than permitted under this Act or regulations made thereunder, shall be taken into custody and deported in the same manner as provided for in sections 19 and 20 of the Immigration Act of 1917: PROVIDED, That the Secretary of Labor may, under such conditions and restrictions as to support and care as he may deem necessary, permit permanently to remain in the United States, any alien child who, when under sixteen years of age was heretofore temporarily admitted to the United States and who is now within the United States and either of whose parents is a citizen of the United States. (43 Stat. 162).

Maintenance of Exempt Status

Sec. 15. The admission to the United States of an alien excepted from the class of immigrants by clause (2), (3), (4), (5), or (6) of section 3, or declared to be a non-quota immigrant by subdivision (e) of section 4, shall be for such time as may be by regulations prescribed, and under such conditions as may be by regulations prescribed (including, when deemed necessary for the classes mentioned in clauses (2), (3), (4), or (6) of section 3, the giving of bond with sufficient surety, in such sum and containing such conditions as may be by regulations prescribed) to insure that, at the expiration of such time or upon failure to maintain the status under which admitted, he will depart from the United States. (43 Stat. 162.)

Except for changing the words "the Secretary of Labor" to the words "the Attorney General" the above provisions have not been substantially amended since 1924.

* * *

Regulations of The Immigration and Naturalization Service

The Immigration Rules of March 1, 1927, which were in effect in 1929, contained the following provision concerning the entrance of treaty traders:

Par. 3. Where the examining officer is satisfied beyond a doubt that an alien seeking to enter the United States as a nonimmigrant pursuant to subdivision (6) of section 3 of the immigration act of 1924 is entitled to enter solely to carry on trade under and in pursuance of a treaty of commerce and navigation which existed on May 26, 1924, he may admit such alien, or his lawful wife and minor children, if otherwise admissible, on condition that such *alien shall maintain such status of a nonimmigrant during his stay in the United States, and upon failure or refusal to maintain such status that he will voluntarily depart*: Provided, That when such examining officer is not satisfied that any alien is a non-immigrant within the meaning of subdivision (6) of section 3 of said act he shall hold such alien for examination in relation thereto by a board of special inquiry, and such board may admit such alien, if otherwise admissible, on the conditions set forth and may exact bond in the sum of $500 to insure the faithful performance of all and singular of such conditions. . . . Rule 3, subdivision (h), par. 4. (Italics ours).

The following regulations were adopted subsequent to 1929 and are in effect at the present time:

Section 54.1. *Treaty merchants, their wives and minor children; conditions of admission.* Where the examining officer is satisfied beyond a doubt that an

alien seeking to enter the United States as a nonimmigrant pursuant to section 3 (6) of the Immigration Act of 1924 (47 Stat. 607; 8 U. S. C. 203) is entitled to enter solely to carry on trade under and in pursuance of a treaty of commerce and navigation which existed on May 26, 1924, he may admit such alien, or his lawful wife and minor children, if otherwise admissible, on condition that such alien shall maintain such status of a nonimmigrant during his stay in the United States, and upon failure or refusal to maintain such status that he will voluntarily depart: Provided, That when such examining officer is not satisfied that any alien is a nonimmigrant within the meaning of section 3 (6) of said Act he shall hold such alien for examination in relation thereto by a board of special inquiry, and such board may admit such alien, if otherwise admissible, on the conditions set forth in this part and may exact bond in the sum of $500 to insure the faithful performance all and singular of such conditions. Where such bond is exacted from a husband or father admitted under section 3 (6) a bond may be exacted of the alien wife or minor children to insure that the wives or minor children shall depart from the country without expense to the United States upon the failure of the husband or father to maintain his exempt status as such a merchant, and, in the case of the wife, upon the termination of marital relationship: And Provided further, That at ports where there are no permanent boards of special inquiry the exacting of bonds shall be under the control of the officer in charge. (23 Stat. 116, sec. 2, 28 Stat. 8, sec. 15, 43 Stat. 162; 8 U. S. C. 265, 289, 215).

Section 54.4. *Treaty merchants, their wives and children, failing to maintain status; visitors and transits, failing to depart; deportation.* Aliens who have been admitted as nonimmigrants temporarily for business or pleasure under section 3 (2) of the Immigration Act of 1924 (43 Stat. 154; 8 U. S. C. 203), and who fail to depart within the period for which admitted, or to which admission has been extended; those admitted as nonimmigrants under section 3 (3) for the purpose of transit through the United States who shall fail or re-

fuse to pass through and out of the United States within the time fixed or allowed, or who shall be found within the United States after the expiration of such time; and aliens admitted under section 3 (6) of said Act (47 Stat. 607; 8 U. S. C. 203) as nonimmigrants (together with their alien wives and minor children admitted at the same time or subsequently) who shall fail or refuse to maintain the status under which admitted, or to depart voluntarily when they have ceased to maintain such status, shall be taken into custody upon the warrant of the Secretary of Labor and deported as provided in section 14 of the Immigration Act of 1924. (Secs. 14, 15, 43 Stat. 162; 8 U. S. C. 214, 215). Title 8, Code of Federal Regulations.

Change of Status

3.31. *Officials, traders, visitors; change of status, conditions.* After an alien has gained admission by claiming a visitor's status, a trader's status or (except in the case of a government official or his family) an official status, or by meeting the requirements of section 4(e), Immigration Act of 1924 (43 Stat. 155; 8 U. S. C. 204 (e)), he cannot change from the specific status under which he was admitted, unless, because of the peculiar circumstances of his case, the Secretary of Labor authorizes such change. In meritorious cases where the Secretary of Labor does authorize such change, he may (except in the case of an alien becoming a government official or a member of the family of such an official) exact, as a condition of the change, a bond in such sum and with such provisions as he deems appropriate to insure that the alien shall voluntarily depart from the United States at the expiration of a time fixed by the Secretary of Labor or upon his failure to maintain the specific new status acquired, whichever shall happen sooner. Title 8, Code of Federal Regulations.

Deportation

The following sections are taken from the deportation regulations of the Immigration and Naturalization Service which were in effect on December 23, 1940:

19.1 *Investigation and report as to aliens believed to be subject to deportation.* Officers shall make thorough investigation of all cases when they are credibly informed or have reason to believe that a specified alien in the United States is subject to arrest and deportation on warrant. All such cases, by whomsoever discovered, shall be reported to the immigration officer stationed nearest the place where the alien is found.

* * *

19.6 *Execution of warrant of arrest; hearing thereon; detention of alien.* Upon receipt of a telegraphic or formal warrant of arrest the alien shall be taken before the person or persons therein named or described and granted a hearing to enable him to show cause, if any there be, why he should not be deported. Pending determination of the case, in the discretion of the officer in charge, he may be taken into custody or allowed to remain in some place deemed by such officer secure and proper, except that in the absence of special instructions an alien confined in an institution shall not be removed therefrom until a warrant of deportation has been issued and is about to be served.

* * *

19.8 *Hearing; rights of alien; additional charges.* At the hearing under the warrant of arrest the alien shall be allowed to inspect the warrant of arrest and shall be advised that he may be represented by counsel. The alien shall be required then and there to state whether he desires counsel or waives the same, and his reply shall be entered on the record. If counsel be selected, he shall be permitted to be present during the conduct of the hearing and to offer evidence to meet any evidence presented or adduced by the Government. Objections of counsel shall be entered on the record, but the reasons for such objections shall be presented in accompanying brief. If, during the hearing, it shall appear to the examining officer that there exists a reason additional to those stated in the warrant of arrest why the alien is in the country in violation of law, the alien shall be notified that such additional charge will be placed against him and he shall be given an opportu-

nity to show cause why he should not be deported therefor. (Title 8, Code of Federal Regulations, 19.1, 19.6 and 19.8.)

The following regulations on deportation procedure were promulgated by the Attorney General December 31, 1940 and became effective January 20, 1941:

150.1 *Investigation—(a) Aliens reported, or believed, to be subject to deportation.* The case of every alien reported, or believed, to be subject to arrest and deportation, shall be thoroughly investigated by such officer as may be designated for that purpose.

(b) Purpose. The purpose of the investigation shall be to discover whether or not a prima facie case for deportation exists; that is, whether there is credible evidence reasonably establishing (1) that the person investigated is an alien, and (2) that he is subject to deportation.

(c) Interrogation of aliens under investigation. All statements secured from the alien or any other person during the investigation, which are to be used as evidence, shall be taken down in writing; and the investigating officer shall ask the person interrogated to sign the statement. Whenever such a recorded statement is to be obtained from any person, the investigating officer shall identify himself to such person and the interrogation of that person shall be under oath or affirmation. Whenever a recorded statement is to be obtained from a person under investigation, he shall be warned that any statement made by him may be used as evidence in any subsequent proceeding. . . .

150.6 (i) *Use of statement or admissions made during investigation.* A recorded statement made by the alien (other than a General Information Form) or by any other person during an investigation may be received in evidence only if the maker of such statement is unavailable or refuses to testify at the warrant hearing or gives testimony contradicting the statements made during the investigation. An affidavit of an inspector as to the statements made by the alien or any

other person during an investigation may be received in evidence, otherwise than in support of the testimony of the inspector, only if the maker of such statement is unavailable or refuses to testify at the warrant hearing or gives testimony contradicting the statement and the inspector is unavailable to testify in person.
Title 8, Cumulative Supplement, Code of Federal Regulations, 150.1 (a), (b), (c), 150.6 (i), effective January 20, 1941.

* * *

Treaty Provisions

Treaty of commerce and navigation between the United States and Japan, at Washington, February 21, 1911; ratification advised by the Senate, with amendment, February 24, 1911; ratified by the President, March 2, 1911; ratified by Japan, March 31, 1911; ratifications exchanged at Tokyo, April 4, 1911; proclaimed, April 5, 1911.

Article I

The citizens or subjects of each of the High Contracting Parties shall have liberty to enter, travel and reside in the territories of the other to carry on trade, wholesale and retail, to own or lease and occupy houses, manufactories, warehouses and shops, to employ agents of their choice, to lease land for residential and commercial purposes, and generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects, submitting themselves to the laws and regulations there established.

They shall not be compelled, under any pretext whatever, to pay any charges or taxes other or higher than those that are or may be paid by native citizens or subjects.

The citizens or subjects of each of the High Contracting Parties shall receive, in the territories of the other, the most constant protection and security for their persons and property, and shall enjoy in this respect the same rights and privileges as are or may be granted to native citizens or subjects, on their submit-

ting themselves to the conditions imposed upon the native citizens or subjects . . .

Article XVII

The present Treaty shall enter into operation on the 17th of July, 1911, and shall remain in force twelve years or until the expiration of six months from the date on which either of the Contracting Parties shall have given notice to the other of its intention to terminate the Treaty.

In case neither of the Contracting Parties shall have given notice to the other six months before the expiration of the said period of twelve years of its intention to terminate the Treaty, it shall continue operative until the expiration of six months from the date on which either Party shall have given such notice.
(37 Statutes 1504)

* * *

ABROGATION OF JAPANESE TREATY

The following excerpt, taken from the Digest of International Law, is the only reference appellee has been able to locate to the abrogation of the Japanese Treaty:

The commercial treaty with Japan signed February 21, 1911 (3 Treaties etc. [Redmond, 1923] 2712) provided for termination upon six months' notice. Resolutions had been introduced in the Senate on July 18, 1939 and in the House of Representatives the following day to the effect that the United States should give the six months' notice required for abrogation of the treaty. Neither House had taken action on these resolutions, but on July 26, 1939, the Department of State delivered a formal note to the Japanese Embassy giving notice of the intention of the United States to terminate the treaty. This note stated in part that—

> the Government of the United States, acting in accordance with the procedure prescribed in Article XVII of the treaty under reference, gives notice hereby of its desire that this treaty be termi-

nated, and, having thus given notice, will expect the treaty, together with its accompanying protocol, to expire six months from this date.

In answer to inquiries thereafter made concerning the power of the President to denounce a treaty without the advice or approval of the Senate, the Department of State wrote:

> . . . the power to denounce a treaty inheres in the President of the United States in his capacity as Chief Executive of a sovereign state. This capacity, as you are aware, is inherent in the sovereign quality of the Government, and carries with it full control over the foreign relations of the nation, except as specifically limited by the Constitution. Without entering into a lengthy discussion of the general and specific arguments leading to this conclusion, it will perhaps be sufficient to quote the conclusion of Professor Willoughby (Constitutional Law of the United States, 2nd Ed. I, p. 585): "It would seem, indeed, that there is no constitutional obligation upon the part of the Executive to submit his treaty denunciations to the Congress for its approval and ratification, although, as has been seen, this has been several times done." The author questions even the power of Congress, by joint resolution or otherwise, to direct the President to denounce a treaty, though such directions also have been given, and in some instances followed, though in others the direction has been successfully refused (statement issued by the Secretary of State, September 25, 1920). This conclusion would seem to be entirely in accord with the general spirit of the interpretation of the Constitution in this regard by the Supreme Court of the United States as indicated, for instance, by the case of *United States* v. *Curtiss-Wright,* 299 U. S., p. 304.

(Pages 331-332, Chapter XVI, Vol. V, DIGEST OF INTERNATIONAL LAW by Green Haywood Hack-

worth [United States Government Printing Office, Washington: 1943])

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U. S. Department of Labor

Immigration and Naturalization Service

Washington

55940/63

January 22, 1940.

CIRCULAR LETTER NO. 408

TO ALL DISTRICTS,

IMMIGRATION AND NATURALIZATION SERVICE:

SUBJECT: *Status of merchants of Japanese nationality after abrogation of the Treaty of Commerce and Navigation between the United States and Japan.*

1. *Reference*: Treaty of Commerce and Navigation between the United States and Japan, signed February 21, 1911, Treaty Series No. 558, 37 Stat. 1504; Immigration Act of 1924, Sec. 3 (6), 43 Stat. 155, 8 U. S. C. 203 (6); Immigration Act of 1924, Sec. 3 (2), 43 Stat. 154, 8 U. S. C. 203 (2); Rule 3, Subd. H, Para. 1, Immigration Rules and Regulations of January 1, 1930, as amended; Rule 3, Subd. H, Para. 4, Immigration Rules and Regulations of January 1, 1930 as amended.

2. The Treaty of Commerce and Navigation between the United States and Japan, cited above, will terminate on January 26, 1940. This Department, with the concurrence of the Department of State, has decided that Japanese subjects now in this country who were admitted under the provisions of Section 3(6) of the Immigration Act of 1924, and whose status as "treaty merchants" will lapse in the absence of such treaty provisions, may be permitted to remain in this coun-

try as visitors for business under Section 3(2) of the Immigration Act of 1924.

3. The Department of State has instructed its consular officers that in the absence of a treaty of commerce between the United States and Japan, the applications of Japanese nationals who wish to enter the United States temporarily for business or pleasure will be considered in the light of existing law and regulations applicable to visas for temporary visitors, and that while it is important to avoid unreasonable strictness in applying the provisions of Section 3(2), an applicant intending to remain indefinitely or for a long period of time in the United States is not properly classifiable as a temporary visitor.

4. Japanese aliens now in the United States who have previously been admitted as treaty merchants, and who depart from the country with the expectation and desire of returning here at a time subsequent to the termination of the treaty, must apply for their visas at American consulates, and the determination of the type of visa which may be granted to them will rest with the American consular officers to whom they may apply. Such determination, of course, will not preclude inquiry by this Service concerning their status upon their arrival at a port of entry.

5. It is not contemplated that the field offices of this Service should *initiate* action to bring the subject matter of this circular to the attention of Japanese nationals whose status may be affected by the expiration of the treaty. However, inquiries concerning the status of such persons may be answered upon the basis of the information contained herein.

JAMES L. HOUGHTELING,
(JAMES L. HOUGHTELING)
Commissioner.